

**BEFORE THE INDIANA
BOARD OF SPECIAL EDUCATION APPEALS**

In the Matter of H.D.)	
And)	
Plainfield Community School Corp.,)	Article 7 Hearing No. 1391.04
And West Central Joint Services)	
)	
Appeal from a Decision by)	
Joseph R. McKinney, J.D., Ed.D.)	
Independent Hearing Officer)	

COMBINED FINDINGS OF FACT AND CONCLUSIONS OF LAW, WITH ORDERS

Procedural History

The Student¹ is a fourteen-year-old student. Plainfield Community School Corporation and West Central Joint Services will be referred to as the “School.” The Student, by her mother, requested a due process hearing on November 5, 2003, pursuant to 511 IAC 7-30-3. Joseph McKinney, J.D., Ed.D., was appointed on November 6, 2003, as the Independent Hearing Officer (IHO). After the parties were duly notified, a Pre-Hearing Conference was held by telephone on November 20, 2003. On November 26, 2003, the IHO issued a Pre-Hearing Order which described the issues for the hearing, scheduled the due process hearing for December 11 and 12, 2003, and set an exchange day deadline of December 5, 2003.

The specific issues for the hearing were as follows:

1. Whether the IEP (and the implementation thereof) provides the Student with a free and appropriate education.
2. Whether the School has provided all requested documents to the parents of the Student.
3. Whether the School followed the procedures set forth in Article 7 regarding Notice of a Case Conference Meeting.
4. Whether the School has appropriately evaluated the Student.

The parties agreed at the due process hearing that Issue 4 was not in dispute for the hearing.

¹“Student” shall refer to the Student and the Student’s Parents, unless otherwise indicated.

The Due Process Hearing was held on December 11 and 12, 2003. The parties stipulated to the admission of all of each other's exhibits (Petitioner's Exhibits A-P, Respondent's Exhibits 1-11) except for Respondent's G-70, page 504. Petitioner's motion not to admit G-70 was granted because the document was not relevant. Witnesses at the Hearing were separated. The School was represented by Karen Glasser Sharp, attorney. The mother represented herself and the Student. Jill Summerlot served as Parent Advocate.

Two days prior to the Due Process Hearing, the School filed Respondent's Motion to Dismiss Issues. The motion stated that Issues 3 and 4 and a portion of Issue 1 had been previously decided by the Indiana Department of Education (IDOE) pursuant to three complaints that were filed by the mother. At the Due Process Hearing the IHO agreed not to rule on matters decided by IDOE Complaint Investigators (in accordance with the law).

By a joint motion that was granted by the IHO, the hearing decision deadline was extended to January 9, 2004.

The Written Decision of the IHO

The IHO's written decision was issued on January 9, 2004. In his decision, he determined forty-one (41) Findings of Fact. These Findings of Fact are reproduced below:

The IHO's Findings of Fact

1. The Student is a fourteen-year-old 7th grade student at a middle school. She was thirteen at the time of the due process hearing.
2. The Student was referred for a special education evaluation when she was in the 3rd grade in another school corporation. At the time, her verbal intelligence score was low average, her performance score was at the high end of the borderline range, and full-scale score was low average as measured by the WISC-III. She was found not eligible for special education services.
3. A psychoeducational assessment of the Student was conducted in November of 2000 by the School. WISC=III was administered to the Student. Her overall intelligence score fell in the low average range, around 80 on a scale where 90-109 is average. Her verbal intelligence score was lower in the mid-70's. The Student's performance score on a subtest involving immediate problem solving presented in a visual format was within the average range. The school psychologist, who holds a Ph.D. stated that the Student is likely to be a slow learner.
4. On December 12, 2000 the case conference committee determined that the Student was eligible for special education as a child with a learning disability (L.D.).

5. An IEP dated January 15, 2003 indicates that the Case Conference Committee determined the Student's primary disability is L.D., and a secondary disability is other health impaired (OHI). The OHI category was added by the Case Conference Committee because the Student was diagnosed with ADHD.
6. The Student currently qualifies for special education and related services under the categories of LD and OHI.
7. A psychoeducational assessment was conducted in February, 2002. The Stanford-Binet Intelligence Test IV (SB-IV) was administered to the Student. Her overall (composite) score on the SB-IV fell in the low average range. The School psychologist also noted the Student has weak visual-motor skills.
8. The Student earned 5 "Bs" and 2 "As" the first semester of 6th grade. The Student earned an "A", 3 "Bs" and 3 "Cs" the second semester of 6th grade.
9. Sixth grade teachers reported the Student made educational and social progress during the 6th grade.
10. The parent filed complaints in April and May 2003 with the Indiana Department of Education, Division of Exceptional Learners (Division) alleging the School violated Article 7. Complaint investigations were conducted and reports were issued by the Division. The School was required to take corrective action. The School complied with the required corrective action.
11. A case conference committee meeting convened on August 6, 2003. An IEP was developed that contained more than 20 accommodations including a Problem Solving Plan (PSP) that was set forth on a separate page.
12. The LRE was reviewed at the August 6, 2003 case conference meeting and it was determined that the Student would received special education services 21-60% of the day.
13. Dr. Hudson, a neuropsychologist (Ph.D.) who independently evaluated the Student, participated by phone in the case conference meeting. He supported the OHI diagnosis and also discussed what is called "executive disturbance or dysfunction" that affect the Student's organization and attention skills.
14. Dr. Hudson conducted a neuropsychological evaluation during June 2003. She received scores on the Luria-Nebraska Neuropsychological Battery-II (LNNB-II) that suggested mild neuropsychological delay primarily involving the prefrontal lobe. Dr. Hudson reported that the Student demonstrated in executive functions slightly beyond that expected for an individual with average-low IQ. Dr. Hudson shared his findings with the case conference committee.

15. New goals for problem solving and organization were added to the August 6th IEP. The measurable benchmark for the problem solving goal and objective was set forth: "By the end of 1st 9 weeks, Student will begin to use the problem solving format with adult assistance." The evaluation procedures listed, "teacher obs., data documentation."
16. The case conference committee developed a simple problem solving plan (PSP) or format as one of over 20 accommodations for the Student. The PSP was developed to assist the Student to stay on task in class, and to help her find solutions to "presenting" problems. The PSP stated: 1. What is the problem? 2. What can I do? 3. Pick one. 4. Do! The annual goal was for the Student to develop problem-solving skills employing the PSP format.
17. The Student's teacher of record (TOR) discussed the Student's IEP accommodations and specifically the PSP with all of the Student's 7th grade teachers and instructional assistant on August 11, 2003. The TOR discussed the Student's ADHD and executive function disturbances.
18. On August 25, 2003, the case conference committee revised the IEP by clarifying that an instructional assistant was to be provided for a specific 3-week period in general education classes. The 3-week period had a beginning and ending date.
19. The instructional assistant was given a set of expectations for her 3-week job. She was asked to do many things, including assisting the Student with the PSP.
20. The instructional assistant formally administered the PSP 4 to 5 times per day during the 3-week period. The instructional assistant also helped the Student with organization, notes, her agenda and explanations of assignments. She monitored the Student for on and off-task behavior.
21. The Mother filed a complaint with the Division on September 23, 2003 alleging the School failed to implement the IEP, in relevant part, for failing to provide the instructional assistant during each class period from August 25, 2003 through September 15, 2003. Specifically, the School failed to provide the instructional assistant during part of the first period for the advisor-advisee time or for choir the last period. The Division found a violation of Article 7 and called for corrective action (an assurance letter that IEPs shall be implemented as written). On November 26, 2003, the Division issued a letter stating that corrective action had been achieved.
22. The School interpreted the PSP to be a flexible plan enabling teachers to use it (if necessary) as a guide for prompting, focusing, and re-focusing the Student if she appeared off-task or not to understand something during class.
23. The Mother interpreted the PSP as a document that had to be administered very strictly, without deviation and perhaps used 30 to 50 times per day.

24. The intensive 3-week period with the instructional aide formally using the PSP met the expectation of assisting the Student recognize when she needs the PSP (not literally) and utilizing it minimally.
25. The Student's 7th grade teachers indicated that the Student was asking questions (without assistance), following directions, and was well organized.
26. The Student's 7th grade geography teacher said the Student was doing a great job with organization and is a self-starter. Her science teacher said the Student's attention is good compared to other 7th grade students. The Student's math teacher said she uses the PSP to focus the Student, but the Student is well organized and asks many questions in class. All of the 7th grade teachers indicated they had read the Student's IEP and assisted the Student with problem solving in various ways.
27. The Student's Mother insists the Student needs a one-on-one full-time instructional aide.
28. None of the Student's seven current teachers or her TOR believes the Student needs a full-time, one-on-one aide. Neither do several of the Student's 6th grade teachers. Several 7th grade teachers report the Student improving in class and progressing more academically in class without the one-on-one instructional assistant.
29. The instructional aide who assisted the student kept detailed notes during her 3-week period. She documented use of the PSP. The instructional aide talked about her observations of the Student and use of the PSP at a September 11th case conference committee meeting.
30. The instructional assistant for 7th grade math and English used the PSP and made written observations.
31. Teachers did not reduce to writing their observations of the Student with regard to the PSP because all of them thought she was doing well with problem solving demonstrated by asking questions, maintaining attention and improving in class. Teachers shared the Student's progress at case conference committee meetings, with the Student's TOR, progress reports and grades.
32. If the PSP were implemented in a formal, strict manner, the Student would miss much academic instruction.
33. Dr. Hudson could not recite the PSP as written in the IEP, and strongly indicated it was not to be interpreted as a precise formula to be used rigidly every time the Student encounters a problem. The PSP is contextual and must be adapted to the challenging situation.

34. Dr. Hudson indicated problems should not be created for the Student so she can use the PSP. Dr. Hudson said it is more important that the Student not miss academic content than the School formally and constantly applying the PSP.
35. The Student's 7th grade grades for the first quarter of the semester were 6 "Cs" and 1 "B" and her 2nd semester midterm grades were 1 "A", 5 "Cs" and 1 "D".
36. The School timely provided the Mother with written notification of a case conference committee meeting on September 11, 2003 that stated, in part, that the Student's progress would be discussed as well as evaluation data.
37. The Mother asked the School in mid-September to provide her with the notes (documentation) the instructional assistant had written during the intensive 3-week period.
38. The School did not provide the Mother with the written notes because they thought the notes were the instructional assistant's own personal notes. The School noted to the Mother that the instructional assistant shared information about the student based on her notes at the September 11th case conference meeting.
39. When the School learned in December that the instructional assistant had shared the notes, and the notes were part of the Student's confidential record, the School provided the Mother with the notes (as part of the discovery material in this case).
40. The Student was not adversely affected academically by the School's failure to provide the Mother with the instructional assistant's notes in a timely manner.
41. A case conference committee meeting was conducted on October 23, 2003. Additional accommodations were discussed. Communication between home and the School was discussed. The School reported the Student was making progress at the end of the first 9 weeks, including problem solving. Minor revisions were made to the IEP.

The IHO's Conclusions of Law

Based on the forty-one (41) Findings of Fact, the IHO reached three (3) Conclusions of Law. These Conclusions of Law are reproduced below:

Issue I.

Whether the IEP (and the implementation thereof) provides the Student with a free and appropriate education.

The IEP's dated August 6, 2003, September 11, 2003 and October 23, 2003 provide the Student with a free and appropriate education. The Student is making academic and social progress and is benefitting from her special education, including her accommodations.

The School has fully implemented the IEP's, including the Problem Solving Plan. The Mother's position regarding the PSP places form over substance.

Issue II.

Whether the School has provided all requested documents to the parents of the Student.

The School failed to timely provide notes made by the (3-week) instructional assistant. The School made a good-faith mistake of fact and law regarding the notes. However, the Student was not academically adversely affected by the School's action, which was corrected.

Issue III.

Whether the School followed the procedures set forth in Article 7 regarding Notice of a Case Conference Meeting.

The School complied with Article 7 with respect to notices of case conferences, including notice of the September 11, 2003 case conference committee meeting.

The IHO's Order

Based upon the Findings of Fact and Conclusions of Law, the IHO issued the following Order:

The School continue to implement the current IEP.

The IHO advised the parties of their appeal rights.

APPEAL TO THE BOARD OF SPECIAL EDUCATION APPEALS

The School, by counsel, requested an extension of time within which to prepare and file a Response to the Student's Petition for Review. The request was received on February 5, 2004. The BSEA granted the request and issued an Order on February 6, 2004, extending the time line to the close of business on March 16, 2004, within which the School must prepare and file its Response to the Petition for Review. The timelines for review and issuance of a written decision by the BSEA were also extended to and including April 16, 2004.

The Student's Petition for Review

The Student timely filed on February 4, 2004, a Petition for Review with the Indiana Board of Special Education Appeals (BSEA). The Petition for Review is reproduced, in part, as follows:

...I request your consideration on the following reasons for the objections to the hearing officer's decision. In pursuant to the findings of facts stated by Dr. Joseph McKinney in his decision:

#13 – . . .Objection: On page 162 of the hearing transcript, Dr. Hudson also stated, “that the Student has difficulty organizing their mental resources, and has difficulties understanding where exactly they should start, and how they should approach the task.” This disturbance affects more than just organization and attention skills.

#14 – . . .Objection: On Respondents' exhibit F-104, page 0344, it states “The **disturbances** she demonstrated in executive functions were slightly beyond that expected for an individual with average-low IQ.”

#17 – . . .Objection: On page 78 of the hearing transcript, Debbie Owens, the Student's art teacher, stated that she did not receive any in-service training. On page 297 of the hearing transcript, Erin Jones, the Student's instructional assistant, stated that she did not receive any in-service training. On page 328 of the hearing transcript, Lesa Miller stated that she did not receive any in-service training. Not **all** of the 7th grade teachers had discussed the Student's IEP accommodations and specifically the PSP.

#18 – . . .Objection: On page 99 of the hearing transcript, Mr. Murray stated that the agreed time was for a trial period of three weeks, and also agreed that we would reconvene after the three weeks to determine if the aide needed to continue or not.

#20 – . . .Objection: On page 302 of the hearing transcript, Mrs. Erin Jones, the instructional assistant, stated that there were **some** days she used it for four or five times, and there were other days she didn't need to. The Respondents' exhibits of Mrs. Jones's daily records do not reflect the PSP being used 4 to 5 times per day.

#22 – . . .Objection: A Student's PSP is to enable the student (not the teachers) to use it (if necessary) as a guide for prompting, focusing, and re-focusing the Student if she appeared off-task or not to understand something during class.

#23 – . . .Objection: I do not believe the hearing transcript shows that I believe the PSP to be administered, 30 to 50 times per day, as a document (word for word), but as a plan of action to help automate the problem solving process. As indicated on pages 174 and 175 of the hearing transcript, Dr. Hudson stated how he felt the PSP should be implemented (on very consistent, strenuous circumstances), and I interpreted the implementation of the PSP to be the same.

#24 – . . .Objection: On Respondents' exhibit G-13 page 0380, it was the goal of the School that by the end of the 3 weeks H[.] will **begin** to recognize when she needs the plan and will utilize it with minimal assistance. On page 313 of the hearing transcript, Mrs. Jones stated that she did not feel H[.] had begun to “recognize when she needs the

plan and can use it with minimal assistance.” Therefore, how did the intensive 3-week period meet the expectation? Dr McKinney’s findings of fact is in direct conflict to Mrs. Jones’ testimony.

#25 – . . .Objection: On pages 380, 381, 382, 383, and 384 of the hearing transcript explains why I believe H[.] was well organized in class and was able to ask questions. I believe that without the support of the PSP being used at home the school would not be seeing H[.] as well-organized and asking questions. On page 193 of the hearing transcript, Dr. Hudson states that H[.]’s behavior is easily mistaken as a normative behavior. Also on page 306 of the hearing transcript, Mrs. Jones states that it would be very easy for the teachers to assume that H[.] is understanding and on task when in reality H[.] is not. On page 187 of the hearing transcript, Dr. Hudson states that “in the event that she appears to be focusing on task and performing the work...you would need to be concerned with is whether or not she is actually doing the work assigned...or is she’s simply making some effort not to look unbusy, which I know she’s inclined to do at times.”

#26 – . . .Objection: Same as #25 objection. The Student’s math teacher uses the PSP to focus the Student. All of the 7th grade teachers did not indicate they had read the Student’s IEP, but on page 63 of the hearing transcript, Mike Meunier could not tell what the PSP was, describe it, or state when he had administered it. On page 77 of the hearing transcript, Debbie Owens could not tell what the PSP was, describe it, or state when she had administered it. On page 90 of the hearing transcript, Mindy Slavens could not tell what the PSP was or administered the PSP. On page 109 of the hearing transcript, Joan Effinger stated she had not personally administered the PSP. On page 350 of the hearing transcript, Martha Jennings stated she had not personally administered the PSP.

#28 – . . .Objection: On pages 62, 89, 107, 119, 140, 297, and 327 of the hearing transcript shows the teachers that have stated to not having any experience, education, training, or expertise in the area of executive brain disturbances. Therefore, how can the mentioned teachers determine if the Student needs a full-time one-on-one aide to address the behaviors exhibited from the executive brain dysfunction or not?

#29 – . . .Objection: Respondents’ exhibits of the instructional aide’s detailed notes documents the student’s behavioral, social, and academic struggles the entire 3-week period.

#30 – . . .Objection: On page 145 of the hearing transcript, the assistant could not recall using the PSP in English. The assistant stated she had used the PSP, although could not state the PSP or describe it. The instructional assistant’s written observations document the student’s behavioral, social, and academic struggles. Respondents’ exhibits G-47 page 455, G-53 page 465, G-61 page 483, G-64 page 498 are just a few of the written observations made by the instructional assistant for 7th grade math and English. The written observations are worded almost exactly the same each time. Therefore, I do not believe the observations are true and accurate of H[.].

#32 – . . . Observation: On page 192 of the hearing transcript, Dr. Hudson stated, “the cost is definitely worth the reward.” The PSP was not intended to be a permanent plan, but a short-term process to enable the Student to automate her problem solving ability.

#33 – . . . Objection: On page 190 of the hearing transcript, Dr. Hudson could accurately describe the PSP. The case conference committee developed the PSP specifically for H[.]. The PSP was not a precise formula, but a plan to be used rigidly every time the Student encounters a problem.

#34 – . . . Objection: Both instructional aides have documented enough opportunities to implement the PSP without creating problems. Why would we want to create problems for H[.]? On pages 185 and 186 of the hearing transcript, Dr. Hudson acknowledges that “you can’t ever make the assumption that she’s not going to miss out on the instruction,” but “the more opportunities during the **first** two or three weeks that person had to step in and actually implement that plan, the more training experiences you have, so that is actually a good thing...”

#35 – . . . Objection: On page 217 of the hearing transcript, the school acknowledges that a student’s grades reflect more than just academic ability. Grades are not a true assessment of a student’s academic progress.

#38 – . . . Objection: Respondents’ exhibit G-13 page 0380, the school expected the instructional assistant to keep a daily record of H[.]’s daily progress. The instructional assistant was to report on behavior, on-task behavior, off-task behavior, improvements, progress with the plan, etc. Therefore, the school was aware the record was more than just Mrs. Jones’ personal notes.

#39 – . . . Objection: On page 313 of the hearing transcript, Mrs. Jones stated that she provided the School with her notes on September 16th. On page 331 of the hearing transcript, Mrs. Miller stated that Mrs. Jones did provide the School with the notes upon her dismissal, and were placed in H[.]’s file in the special ed room. Mrs. Miller also stated that when I requested copies of the notes, Jim Murray and Mr. Wilhelm informed her not to provide me with a copy. I feel if I had not proceeded to due process, I would still not have a copy of the notes to give to Dr. Hudson and her pediatrician.

#40 – . . . Objection: Petitioners’ exhibit F pages 1, 2, 3, 4, states I was requesting the notes in order to assist H[.]’s doctors in assessing if the PSP was helping H[.] to succeed academically. Unfortunately, without being able to provide the doctors with the notes for a full semester, the doctors have not been able to determine if H[.] was successful or not in using the PSP.

#41 – . . . Objection: Respondents’ exhibit G-63 page 0497, the case conference notes do not reflect any report from the School on the Student’s progress at the end of the first 9 weeks, including problem solving. Respondents’ exhibit G-63 page 0491 does state

progress was reported, but the school could not provide any data to substantiate the progress.

Issue I – . . . Objection: The School did not show progress outside of grades, which are not an accurate reflection of H[.]’s academic ability, and progress. On pages 97, 98, 99, 100, 101, 102 of the hearing transcript, the issue was addressed whether the School had not provided H[.] with a free and appropriate education by not providing the one-on-one aide for a full three week period as outlined in her IEP dated August 6, 2003. The Department of Education already found the School was in violation of providing the aide, but my due process issue was the School needed to provided the one-on-one aide. On page 271 of the hearing transcript, Jim Murray states H[.] did not receive the one-on-one aide.

Note: I would also like to note that the hearing transcript is not a complete and accurate record of the Article 7 Hearing No. 1391.04. Testimony and statements have been omitted or overlooked in the preparation of the transcript. During the hearing, Dr. McKinney did ask Jim Murray if at any time after the Department of Education found the school in violation of providing the aide, did the school provide an aide for another period of three weeks for the Student, and Jim Murray stated no. Also I would like it noted that at times Dorothy Huffman, a registered professional reporter, would nod off (as to be sleeping), and the recorder ran out of paper for an extended period of time before more paper was changed. At one point during testimony, Ms. Huffman noticed the recorder’s tape (not paper) needed to be changed and abruptly stopped the proceedings. She also stated numerous times for witnesses to slow down. I believe because of these situations, the hearing transcript is not a complete and accurate record.

Issue II – . . . Objection: The School expected the instructional assistant to keep a daily record of H[.]’s progress. Therefore, the School was aware the record was more than just Mrs. Jones’ personal notes. The School did not make a bona-fide mistake of fact and law, the School blatantly refused to provide the notes. The “mistake” was only corrected after I proceeded to due process and the notes were made part of the Respondents’ exhibits.

Order – . . . Objection: I believe the school should provide my daughter, H[.], with a one-on-one instructional assistant for a period of three weeks in each class of every day as agreed upon by the case conference committee at the August 6, 2003 case conference meeting.

The School’s Response to the Petition for Review

The School timely filed on March 16, 2004, the School’s Response to the Petition for Review.

The School’s Response to the Petition for Review is reproduced, in part, as follows:

A. The IHO's Findings of Fact Should be Upheld as They Are Supported by Substantial Evidence in the Record.

Petitioners raise challenges to the IHO's Findings of Fact 13, 14, 17, 18, 20, 22, 23, 24, 25, 26, 28, 29, 30, 32, 33, 34, 35, 38, 39, 40, and 41. For the reasons that follow, the IHO's Findings of Fact should be affirmed by the Board, with some minor exceptions.

1. Petitioners fail to allege proper grounds for reversal of Finding of Fact 13.

Petitioners do not claim that Finding of Fact 13 is erroneous. Rather, they claim it is incomplete....Incompleteness of a factual finding is not a ground for reversal. The IHO is not required to cite all the evidence in his findings...Finding of Fact 13 is supported by the record....Because Petitioners have not established proper grounds for reversal of Finding of Fact 13 and because that finding is supported by the record evidence, it should be affirmed.

2. The BSEA should affirm Finding of Fact 14, with one minor addition.

...Petitioners' only complaint is that the word "disturbances" was omitted. Respondents agree that in his report, Dr. Hudson stated "[t]he disturbances she demonstrated in executive functions were slightly beyond that expected for an individual with average - low average IQ" ...Thus, Finding of Fact 14 may be amended by inserting the word "disturbances" as follows: ...Dr Hudson reported that the Student demonstrated **disturbances** in executive functions slightly beyond that expected for an individual with average-low IQ...

3. The IHO's Finding of Fact 17 is supported by the record and need not be amended.

The IHO's Finding of Fact 17 is supported by substantial evidence...Because there is substantial evidence to support Finding of Fact 17, it should be affirmed.

4. The IHO correctly relied on evidence presented at the hearing in reaching Finding of Fact 18.

Contrary to Petitioners' assertions, Finding of Fact 18 is supported by substantial evidence...Because there is substantial evidence to support Finding of Fact 18, it should be affirmed.

5. The IHO's Finding of Fact 20 is supported by the record and need not be amended.

Petitioners appear to contend that Finding of Fact 20 is in error because it is incomplete. However, that is not a proper ground for reversal of the IHO's finding. The IHO is not required to cite all the evidence in his findings...Finding of Fact 20 is supported by the record...Because there is substantial evidence to support Finding of Fact 20, it should be affirmed.

6. Finding of Fact 22 should be affirmed as it is supported by the record.

Petitioners challenge the IHO's Finding of Fact 22 regarding the School's interpretation

of the PSP, but fail to cite to any contrary evidence. Moreover, they complain only that the IHO stated in Finding of Fact 22 that the PSP is a guide for the “teacher” rather than the “Student.” Otherwise, they do not challenge Finding of Fact 22. However, the IHO’s Finding of Fact 22 is supported by substantial evidence in the record...Thus, Finding of Fact 22 is correct as stated by the IHO.

7. Finding of Fact 23 is supported by substantial evidence and should be affirmed. Contrary to Petitioners’ assertions, Finding of Fact 23 is supported by substantial evidence...Because there is substantial evidence to support Finding of Fact 23, it should be affirmed.

8. Finding of Fact 24 is correct as stated by the IHO. Contrary to Petitioners’ assertions, Finding of Fact 24 is supported by substantial evidence...Because there is substantial evidence to support Finding of Fact 24, it should be affirmed.

9. Finding of Fact 25 is correct as stated by the IHO. Petitioners complain again that Finding of Fact 25 is incomplete. However, that is not a proper ground for reversal of the IHO’s finding. The IHO is not required to cite all the evidence in his findings...Finding of Fact 25 is supported by the record...Petitioners concede that Finding of Fact 25 is correct in their objection to said finding. Petitioners do not challenge the accuracy of Finding of Fact 25, and the evidence they cite does not contradict Finding of Fact 25. Because Petitioners have not established proper grounds for reversal of Finding of Fact 25 and because that finding is supported by the record evidence, it should be affirmed.

10. Finding of Fact 26 is supported by substantial evidence and should be affirmed. Once again, Petitioners complain that Finding of Fact 26 is incomplete. However, that is not a proper ground for reversal of the IHO’s finding. The IHO is not required to cite all the evidence in his findings...Finding of Fact 26 is supported by the record... Petitioners concede that Finding of Fact 26 is correct in their objection to said finding. Petitioners do not challenge the accuracy of Finding of Fact 26, and the evidence they cite does not contradict Finding of Fact 26. Because Petitioners have not established proper grounds for reversal of Finding of Fact 26 and because that finding is supported by the record evidence, it should be affirmed.

11. Finding of Fact 28 is correct as stated by the IHO. Petitioners do not challenge the accuracy of Finding of Fact 28 but merely argue the IHO should have placed less weight on that testimony. It is within the IHO’s discretion to decide how much weight to accord a witness’ testimony, and there is no evidence that the IHO abused that discretion. Petitioners fail to cite to evidence contradicting the IHO’s Finding of Fact 28. Moreover, Finding of Fact 28 is supported by the record...Because Petitioners have not established proper grounds for reversal of Finding of Fact 28 and because that finding is supported by the record evidence, it should be affirmed.

12. Finding of Fact 29 is supported by the record and need not be amended.

Once again, Petitioners complain that a finding of fact is “incomplete.” However, that is not a proper ground for reversal of the IHO’s Finding of Fact 29. The IHO is not required to cite all the evidence in his findings...Finding of Fact 29 is supported by the record...Petitioners concede that Finding of Fact 29 is correct in their objection to said finding. Petitioners do not challenge the accuracy of Finding of Fact 29, and the evidence they cite does not contradict Finding of Fact 29. Because Petitioners have not established proper grounds for reversal of Finding of Fact 29 and because that finding is supported by the record evidence, it should be affirmed.

13. Finding of Fact 30 is correct as stated by the IHO.

Contrary to Petitioners’ assertions, Finding of Fact 30 is supported by substantial evidence...Because there is substantial evidence to support Finding of Fact 30, it should be affirmed.

14. Finding of Fact 32 is supported by the record and should be affirmed.

Once again, Petitioners complain that a finding of fact is incomplete. However, that is not a proper ground for reversal of the IHO’s Finding of Fact 32. The IHO is not required to cite all the evidence in his findings...Finding of Fact 32 is supported by the record...Petitioners concede that Finding of Fact 32 is correct in their objection to said finding. Petitioners do not challenge the accuracy of Finding of Fact 32, and the evidence they cite does not contradict Finding of Fact 32. Because Petitioners have not established proper grounds for reversal of Finding of Fact 32 and because that finding is supported by the record evidence, it should be affirmed.

15. Finding of Fact 33 is correct as stated by the IHO.

Contrary to Petitioners’ assertions, Finding of Fact 33 is supported by substantial evidence...the IHO correctly found that Dr. Hudson was unable to recite the PSP as written in the IEP. Petitioners’ cite to the bottom of page 190 of the transcript as support for their position. However, Dr. Hudson clearly states in that portion of his testimony that he is reading the plan, not reciting it from memory...Petitioners fail to cite to evidence contradicting the remainder of Finding of Fact 33. Moreover, Dr. Hudson’s testimony supports the remainder of Finding of Fact 33...Because there is substantial evidence to support Finding of Fact 33, it should be affirmed.

16. Finding of Fact 34 can be amended to reflect the testimony at the hearing.

Petitioners challenge Finding of Fact 34 in its entirety...Dr. Hudson did testify that problems should not be created for H[.] just so she can use the PSP...However, Respondents agree that the record does not support that it was Dr. Hudson who testified that it is more important that H[.] not miss academic content than the School formally and constantly apply the PSP. Rather, that was the testimony of Dr. Dones, Mrs. Woodruff, and Mrs. Jones...Dr. Hudson did testify that it is not necessary to implement the PSP when she appears on focus and she is not having a problem because the intent is to have her independent and able to problem solve on her own...Accordingly, the second

sentence of Finding of Fact 34 can be amended to reflect the testimony at the hearing and, as amended, Finding of Fact 34 should be affirmed.

17. Finding of Fact 35 is supported by the record and need not be amended.
Finding of Fact 35 is correct as written...To the extent the Petitioners contend that Finding of Fact 35 is incomplete, that is not a proper ground for reversal of the IHO's Finding of Fact 32. The IHO is not required to cite all the evidence in his findings...Because Petitioners have not established proper grounds for reversal of Finding of Fact 35 and because that finding is supported by the record evidence, it should be affirmed.

18. Finding of Fact 38 is supported by the record and should be affirmed.
Petitioners challenge the IHO's Finding of Fact 38, contending the School "should have known" that Erin Jones' notes were not exempt from disclosure under FERPA and/or Article 7 as her personal notes. However, Finding of Fact 38 is supported by substantial evidence...Because there is substantial evidence to support Finding of Fact 38, it should be affirmed.

19. Finding of Fact 39 is correct as stated by the IHO.
Petitioners challenge the IHO's Finding of Fact 39, arguing that if Mrs. V[.] had not filed for due process, she still would not have the notes. However, Mrs. V[.]'s contention bears no relevance to the challenged finding...Finding of Fact 39 is supported by substantial evidence...Because there is substantial evidence to support Finding of Fact 39, it should be affirmed.

20. Finding of Fact 40 is supported by the record and need not be amended.
Petitioners challenge the IHO's Finding of Fact 40 that "[t]he Student was not adversely affected academically by the School's failure to provide the Mother with the instructional assistant's notes in a timely manner." However, Petitioners fail to cite any evidence to support their contention that the Student was harmed. The record reflects that the Student is now asking questions, that she is more independent than when she had the one-on-one instructional assistant working on the PSP with her, that she is better organized, and is making progress...Moreover, the Student's grades have remained fairly steady, primarily in the average range, with an occasional above or below average grade...The Student is not failing any courses...This is commensurate with or exceeding her ability, according to Dr. Tammie Drake Dones...Because there is substantial evidence to support Finding of Fact 40, it should be affirmed.

21. Finding of Fact 41 is supported by substantial evidence and should be affirmed.
Petitioners' challenge to Finding of Fact 41 elevates form over substance. They acknowledge that the case conference documentation reflects that the School reported H[.] was making progress at the end of the first nine weeks, yet they claim the School did not provide documentation to substantiate the progress. However, Finding of Fact 41 does not state that the School provided documentation of the Student's progress...The

IHO's Finding of Fact 41 is supported by substantial evidence in the record. A case conference committee meeting was conducted on October 23, 2003...Additional accommodations were discussed at the October 23, 2003 case conference. ...Communication between home and school was discussed...The School reported the Student was making progress at the end of the first 9 weeks, including problem-solving...Because there is substantial evidence to support Finding of Fact 41, it should be affirmed.

B. The IHO's Issues Should Be Affirmed As They are Supported by Substantial Evidence in the Record, in Accordance with Applicable Law, Not Beyond the IHO's Authority, and Neither Arbitrary Nor Capricious.

Petitioners raise challenges to the IHO's Conclusions of Law I and II. For the reasons that follow, the IHO's Conclusions of Law should be affirmed by the Board.

1. **Conclusion of Law I should be upheld because the School Corporation's IEPs for 2003-2004 offered FAPE in the LRE.**

...the August 6, 2003, September 11, 2003 and October 23, 2003 IEP offered (and subsequently provided) a FAPE in the LRE as it (1) was created in compliance with the procedural requirements of the IDEA and Article 7; and (2) is designated to meet H[.]'s unique needs and is reasonably calculated to provide meaningful educational benefit...

Petitioners allege only a single procedural violation. They challenge the IHO's Conclusion of Law II that Respondents made a good faith mistake of fact and law by not providing copies of Erin Jones' notes to Mrs. V[.] in a timely fashion. However, the evidence supports the IHO's Conclusion of Law II, as shown in the discussion above regarding the IHO's Finding of Fact 38, 39 and 40. Petitioners did not allege any other violations of the IDEA. Moreover, even if this were considered a technical violation of the IDEA, "[a] violation of the IDEA's procedural provisions is not a *per se* violation of the Act."...There is no indication that the parents' views were not taken into consideration by School personnel. The goals and objectives in the IEP were proposed by the School and reviewed by Mrs. V[.] Mrs. V[.] signed permission to implement the August 6, 2003 IEP...Mrs. V[.] attended the August 6, September 11, and October 23, 2003 case conference and participated in planning H[.]'s IEP...there simply were no procedural violations which prevented Mrs. V[.] from participating in the formulation of an IEP for H[.]...Accordingly, the August 6, 2003 IEP cannot be set aside on procedural grounds.

The next issue is whether the August 6, 2003 IEP was reasonably calculated to enable H[.] to receive educational benefits...Plainly, the August 6, 2003 IEP was not only reasonably calculated to enable H[.] to receive educational benefit, but did in fact provide educational benefit to H[.]...H[.]'s placement in six general education 7th grade classes plus one special education class at her home school certainly meets the requirement that

she have equal opportunity to participate in activities and services available to other students...

Because the August 6, 2003 IEP contains specialized instruction and related services which are specifically designed for H[.] and her needs and provide as much mainstreaming as possible and because it is reasonably calculated to and did provide her educational benefit, the August 6, 2003 IEP offers H[.] a FAPE. No evidence was presented that any procedural error on the School's part prevented H[.]'s parents from participating in the development of H[.]'s IEP or adversely affected the Student academically. Nor was the IEP itself deficient. Thus, the School offered H[.] a FAPE.

Finally, Petitioners' claim that the hearing transcript is not complete must fail. Petitioners supply no evidence for their contention that the transcript is incomplete. Petitioners cite to Jim Murray's testimony that the School did not provide another one-on-one aide for an additional three-week period after the Department of Education found the School in violation of Article 7 for not providing the aide as required by the IEP as evidence that the transcript was incomplete. However, that testimony is contained in the transcript. [Murray, Tr. 292] Petitioners' current claims that the Court Reporter would "nod off" are unsubstantiated. Moreover, Petitioners made no such objection during the hearing. They have waived their right to appeal this issue by not objecting during the hearing below. The other matters alleged by Petitioners, i.e., that the Court Reporter ran out of paper for a period of time, stopped the proceedings to change the paper, and asked witnesses to slow down, indicate that she was diligent in ensuring an accurate transcript² There simply is no evidence that the record is incomplete.

In sum, both applicable law and substantial evidence in the record support the IHO's Conclusion of Law I that the program the School offered to H[.] for the 2003-2004 school year constituted FAPE, i.e., was based upon her individual needs and calculated to confer educational benefit. Petitioners have cited no evidence to support their contention that the record is incomplete. Because the School provided a FAPE, the BSEA should affirm the IHO's Conclusion of Law I.

2. The IHO correctly ruled in Conclusion of Law II that the School District did not intentionally violate the Family Educational Rights and Privacy Act ("FERPA") or Article 7 by not disclosing the instructional assistant's notes until the exchange of evidence five days before the hearing.

Although Petitioners challenge the IHO's Conclusion of Law II that the School made a good-faith mistake of fact and law, they fail to provide supporting documentation for

²The Court Reporter uses both a transcription machine on which she records the proceedings manually and a tape recorder that she uses to audiotape the proceedings. Thus, she has a backup method should she run out of either paper or cassette tape for a period of time.

their claim that the withholding of Erin Jones' notes was intentional...As the IHO noted, and Petitioners failed to challenge, the School now has provided all requested documents to the parents of the Student, and the Student was not academically adversely affected by the School's action, which was corrected...Because the Petitioners provide no record citation to support their contention, the IHO's Conclusion of Law II is supported by the record evidence, and the Student was not harmed, the BSEA should affirm the IHO's Conclusion of Law II.

C. The IHO's Order Should Be Upheld.

Petitioners object to the IHO's Order, contending that the School should provide H[.] with a one-on-one instructional assistant in every class for a three-week period as agreed in the August 6, 2003 IEP. However, Petitioners state no valid grounds for amending the IHO's Order. Moreover, the relief sought may not be pursued in this proceeding because it pertains to matters previously considered by the Indiana Department of Education, Division of Exceptional Learners, in its investigation of a complaint filed by Mrs. V[.]... The Department of Education, Division of Exceptional Learners, through its complaint investigator, Sally Cook, concluded that the School did violate Article 7 by failing to provide the services of an instructional assistant as stated in the IEP...The School was ordered to provide the Department of Education, Division of Exceptional Learners, an assurance letter that IEPs shall be implemented as written...Dr. Murray provided this letter of assurance to Sally Cook on November 24, 2003...Subsequently, the School received a notification from the Indiana Department of Education that the corrective action had been achieved and the Division was closing the file...Therefore, the relief sought by the Petitioners is barred by this prior complaint investigation.

Moreover, as noted in the previous Section regarding the IHO's Conclusion of Law I, the IHO correctly found that the IEP provided the Student a FAPE. Accordingly, his Order that the School continue to apply the IEP as written is appropriate.

Because the IHO's Findings of Fact and Conclusions of Law are supported by substantial evidence and the applicable law, the IHO's Order requiring the School to continue implementing the current IEP should be upheld....

Respondents, Plainfield Community School Corporation and West Central Joint Service ("School"), by counsel, respectfully request that the BSEA deny the Petition for Review and affirm the IHO's Decision in all respects, with the exception of the minor amendments as noted above.

Review by the Indiana Board of Special Education Appeals

A copy of the record was prepared and provided to each member of the BSEA on March 11, 2004. The BSEA, pursuant to 511 IAC 7-30-4(j), decided to review this matter without oral

argument and without the presence of the parties. All parties were so notified by “Notice of Review Without Oral Argument,” dated March 25, 2004. Review was set for April 12, 2004, in Room 225 State House, Indianapolis. All three members of the BSEA appeared on April 12, 2004. After review of the record as a whole and in consideration of the Petition for Review and the Response to the Petition for Review, the BSEA makes the following determinations.

COMBINED FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The BSEA is a three-member administrative appellate body appointed by the State Superintendent of Public Instruction pursuant to 511 IAC 7-30-4(a). In the conduct of its review, the BSEA is to review the entire record to ensure due process hearing procedures were consistent with the requirements of 511 IAC 7-30-3. The BSEA will not disturb the Findings of Fact, Conclusions of Law or Orders of an IHO except where the BSEA determines either a Finding of Fact, Conclusion of Law, or Order determined or reached by the IHO is arbitrary or capricious; an abuse of discretion; contrary to law, contrary to a constitutional right, power, privilege, or immunity; in excess of the IHO’s jurisdiction; reached in violation of established procedure; or unsupported by substantial evidence. 511 IAC 7-30-4(j). The Student timely filed a Petition for Review. The School timely filed a Response to the Petition for Review. The BSEA has jurisdiction to determine this matter. 511 IAC 7-30-4(h).
2. The BSEA accepts Finding of Fact 13 as it is supported by substantial evidence and the record.
3. The BSEA accepts Finding of Fact 14 as amended to read: “Dr. Hudson conducted a neuropsychological evaluation during June 2003. She received scores on the Luria-Nebraska Neuropsychological Battery-II (LNNB-II) that suggested mild neuropsychological delay primarily involving the prefrontal lobe. Dr. Hudson reported that the Student demonstrated disturbances in executive functions slightly beyond that expected for an individual with average-low IQ. Dr. Hudson shared his findings with the case conference committee.”
4. The BSEA accepts Finding of Fact 17 as it is supported by substantial evidence and the record.
5. The BSEA accepts Finding of Fact 18 as it is supported by substantial evidence and the record.
6. The BSEA accepts Finding of Fact 20 as it is supported by substantial evidence and the record.
7. The BSEA accepts Finding of Fact 22 as it is supported by substantial evidence and the record.

8. The BSEA accepts Finding of Fact 23 as it is supported by substantial evidence and the record.
9. The BSEA accepts Finding of Fact 24 as it is supported by substantial evidence and the record.
10. The BSEA accepts Finding of Fact 25 as it is supported by substantial evidence and the record.
11. The BSEA accepts Finding of Fact 26 as it is supported by substantial evidence and the record.
12. The BSEA accepts Finding of Fact 28 as it is supported by substantial evidence and the record.
13. The BSEA accepts Finding of Fact 29 as it is supported by substantial evidence and the record.
14. The BSEA accepts Finding of Fact 30 as it is supported by substantial evidence and the record.
15. The BSEA accepts Finding of Fact 32 as it is supported by substantial evidence and the record.
16. The BSEA accepts Finding of Fact 33 as it is supported by substantial evidence and the record.
17. The BSEA accepts Finding of Fact 34 as amended to read: “Dr. Hudson indicated problems should not be created for the Student so she can use the PSP. Dr. Dones and others said it is more important that the Student not miss academic content that the School formally and constantly applying the PSP.”
18. The BSEA accepts Finding of Fact 35 as it is supported by substantial evidence and the record.
19. The BSEA accepts Finding of Fact 38 as it is supported by substantial evidence and the record.
20. The BSEA accepts Finding of Fact 39 as it is supported by substantial evidence and the record.
21. The BSEA accepts Finding of Fact 40 as it is supported by substantial evidence and the record.

22. The BSEA accepts Finding of Fact 41 as it is supported by substantial evidence and the record.
23. The BSEA sustains the IHO's Conclusion of Law I (Issue I) as the record supports Conclusion of Law I.
24. The BSEA sustains the IHO's Conclusion of Law II (Issue II) as the record supports Conclusion of Law II.
25. The contention that the hearing transcript was defective is not supported by the record and there were no objections made at the hearing. The IHO took notes and there was a backup tape of the hearing.
26. The BSEA supports the IHO's Order that the School continue to implement the current IEP.

ORDERS

In consideration of the foregoing, the Board of Special Education Appeals now issues the following Orders:

1. The Independent Hearing Officer's Order is sustained.
2. Any allegation of error in the Petition for Review not specifically addressed above is deemed denied or overruled, as appropriate.
3. Any additional issues or motions not specifically addressed herein are deemed denied or overruled, as appropriate.

Date: April 12, 2004

/s/ Raymond W. Quist, Ph.D., Chair
Indiana Board of Special Education Appeals

APPEAL STATEMENT

Any party aggrieved by the decision of the Board of Special Education Appeals has thirty (30) calendar days from the receipt of this written decision to request judicial review in a civil court with jurisdiction, as provided by 511 IAC 7-30-4(n) and I.C. 4-21.5-5-5.